72-561

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MICHAEL RODAK, JR., CLE

in the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-561

FLORIDA VANDERBILT DEVELOPMENT CORPORATION, an Ohio corporation, formerly known as FLORIDA REALTY CO., and HAROLD J. BAKER, individually,

Petitioners,

vs.

CHANDLER LEASING DIVISION, PEPSICO SERVICE INDUSTRIES LEASING CORPORATION, a Delaware corporaton,

Respondent.

Petition For A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Thomas B. DeWolf, Esq.
HELLIWELL, MELROSE & DeWOLF
600 Brickell Avenue
Miami, Florida 33131

MIAMI REVIEW — 371-4853 — 377-3721

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Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on July 18, 1972, petition for rehearing denied on August 22, 1972.

OPINIONS BELOW

The Order of the District Court below, granting the Respondent's motion for summary judgment, is unreported and appears in Appendix C, *infra*. The Summary Final Judgment entered by the District Court below, granting the Respondents money damages for breach of contract, is likewise unreported and appears in Appendix B, *infra*. The opinion of the Court of Appeals for the Fifth Circuit, affirming in part, reversing in part and remanding to the District Court, is not yet reported and appears in Appendix A, *infra*.

JURISDICTION

The judgment of the Court of Appeals, printed in Appendix A hereto, was entered on July 18, 1972, petition for rehearing denied on August 22, 1972. On September 6, 1972, the Court of Appeals granted a stay of the issuance of the mandate to October 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Whether the decision of the Court of Appeals that a lessee who terminates a nine-year lease contract during its sixth month may be held liable to the lessor under a contractual acceleration clause for damages consisting of all the rental payments which would accrue during the unexpired term of the lease contract, where the lessor has obtained possession of the property in a replevin action, conflicts with the holdings of controlling local decisions.

Whether the decision below is contrary to the controlling local law insofar as it failed to hold that the lease acceleration clause, which the Court of Appeals enforced, is invalid as a penalty.

Whether the decision of the Court below to the effect that the remedies afforded to lessors under Florida cases such as *Jimmy Hall's Morningside, Inc. v. Blackburn & Peter Enterprises, Inc.*, 235 So.2d 344 (Fla. App. 2nd 1970) may be substantially varied by the terms of a lease agreement is contrary to the holdings and principles of controlling local decisions.

Whether the lessee of a boat is entitled to plead breach of the implied warranty of seaworthiness as an affirmative defense in a lessor's action for damages for breach of a written lease contract.

Whether the fact that a lessor purchases the subject-matter of a lease, after the lessee has tendered possession of same to the lessor, at a purported judicial sale of which the lessee had no notice, for a purchase price which is grossly and flagrantly inadequate, precludes the lessor from recovering under the contractual damages clause.

Whether the failure of a lessor to respond to a tender of possession of the subject-matter of the lease constitutes a repossession of the property by the lessor.

Whether there were issues of material fact in existence which precluded entry of a summary judgment in favor of Respondents.

STATEMENT

The material facts are not in dispute. On February 4, 1970, the parties entered into a written contract whereby Petitioner, Florida Vanderbilt, leased a 1970, 55' Chris-Craft Commander motor vessel from the Respondent for a term of nine years. Petitioner Harold J. Baker guaranteed performance by the lessee.

The contract called for lease payments to be made by the lessee on the following basis: $4,314.99 per month for the first 72 months and after that the sum of $13,626.29 per year for three years (9-year total of $351,558.15). Monthly rental payments were commenced on March 1, 1970 and continued until September 1, 1970, after which it is stipulated that the lessee ceased making payments (leaving a balance of $321,353.22 for the unexpired term of the lease).

Title to the vessel remained in the lessor at all times.

On October 30, 1970, the lessee notified lessor in writing that it was terminating the lease contract. The letter explained that the reason for the termination was an acute and dangerous electrolytic condition which had existed in the vessel from the inception of the contract. The Respondent had failed or neglected to correct this condition despite the lessee's repeated demands. The electrolysis had caused severe corrosion of metal parts of the vessel, including the hull, and had forced the lessee to paint the bottom of the boat several times during the brief existence of the lease. The letter further advised lessor that possession of the vessel (then docked at a Fort Lauderdale marina, as it had been since September 17, 1970) was thereby tendered to the lessor.

Respondent never replied to this correspondence. However, Respondent ultimately obtained entry of a Final Judgment of Replevin in its favor on February 11, 1971. Petitioners were not parties to that action.

On April 19, 1971, at a purported "public sale" of which these Petitioners did not receive notice, *Respondent* purchased the vessel *from itself* for $100,000.00. Not having knowledge of the "sale" Petitioners were effectively precluded from participating in same and from protecting their interest. The result is that the lessor was able to purchase the vessel, which the contract valued in excess of $215,000.00, for the unconscionable sum of $100,000.00. This sale occurred some thirteen and one-half months after the commencement date of the lease. The vessel in question was new when the lessee originally took possession.

Subsequently, on May 24, 1971, the Respondent filed suit against Petitioners in the United States District Court for the Southern District of Florida, invoking that Court's diversity jurisdiction. The Complaint alleged a breach of the lease contract by the Petitioners and sought to recover damages in accordance with a formula established in the contract (Section 14, entitled "Default").[1] Under this

[1]That clause provides in pertinent part, that in the event of termination of the contract due to a breach of same by the lessee:

> " . . . lessee shall also be liable to lessor for a further sum, computed separately as to each category ("A", "B" and "C" below) of terminated equipment returned to or repossessed by lessor: (A) As to any terminated equipment sold by lessor before the expiration of the initial term, the sum of (1) an amount equal to fifteen per cent of the actual cost to the lessor of such equipment plus (2) the "balance of rent", being the unpaid balance (if any) of the total rent reserved herein attributable to such equipment for the portion of the initial term unexpired at the time of such termination ("un-

clause the lessor would be entitled to recover damages consisting of the total rentals which would have become payable during the unexpired term of the lease reduced by the proceeds from the sale of the vessel. (The Respondent computed the total rental payable during the unexpired portion of the lease to be $312,041.92.)

The Petitioners' Answer denied that the lessee had breached the contract and stated several affirmative defenses. The first consisted of an allegation that the lessor had breached a warranty of seaworthiness which, it was contended, must be implied in the contract. This allegation was based on the fact that the lessor knew that the lessee intended to use the vessel for transportation of guests and prospective clients on the navigable waters of the Gulf of Mexico and the Atlantic Ocean and on the

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expired term"), less (3) the net proceeds of such sale. (B) As to any terminated equipment re-let by lessor during the unexpired term, an amount equal to such balance of rent less the net rental proceeds from such re-letting attributable to such unexpired term. (C) As to any terminated equipment which lessor, after having made efforts reasonable in the circumstances, is unable during the unexpired term to sell or to re-let on a reasonable basis, an amount equal to such balance of rent. As to any terminated equipment not returned to or repossessed by lessor, in addition to remaining liable for the return thereof as above provided, lessee shall notwithstanding such termination also be liable to lessor for such balance of rent. Since pursuant to the foregoing lessor may receive payment of such balance of rent at a time or times earlier or later than the same would have fallen due in the absence of termination, such balance of rent is to be adjusted by subtracting discount therefrom or adding interest thereto accordingly, at the rate of 6% per annum, and for the purposes of computing such adjustments, the aforesaid proceeds of sale or re-letting and any sums received from lessee in respect of said termination and of all costs and expenses incurred by lessor hereinbelow mentioned, and thereafter, to the payment of the balance of rent . . . "

contention that the electrolysis problem rendered the vessel unseaworthy and useless for the purpose for which it was intended.

The second Affirmative Defense was based on the lessee's tender of the vessel to the lessor via the letter of October 30, 1970. It contended that by retaking possession of the vessel the lessor had, in essence, elected its remedy and was therefore precluded from seeking damages under the lease.

The remaining Affirmative Defenses alleged a failure of consideration, estoppel and waiver and failure to state a claim upon which relief could be granted.

In opposing these Affirmative Defenses the Respondent relied on a disclaimer of warranties contained in the lease contract.[2]

Petitioner's position was that the disclaimer did not operate to preclude their reliance on the implied warranty of seaworthiness.

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[2] "3: WARRANTY. Lessor, without assuming responsibility for compliance by supplier, will request the supplier to authorize lessee to enforce in lessee's own name all warranties, agreements, or representations, if any, which may be made by the supplier to lessee (or lessor). LESSOR ITSELF MAKES NO EXPRESSED OR IMPLIED WARRANTIES OR REPRESENTATIONS AS TO ANY MATTER WHATSOEVER, INCLUDING, WITHOUT LIMITATIONS, THE CONDITIONS OF EQUIPMENT, ITS MERCHANTABILITY OR ITS FITNESS FOR ANY PARTICULAR PURPOSE. In no event shall any defect in or unfitness of the equipment relieve lessee of the obligation hereunder, once the item has been accepted, or presumed accepted under Paragraph 1 hereof, by lessee."

The case ultimately was decided by the District Court on the Respondent's motion for summary judgment, based on the pleadings and a pre-trial stipulation.

The District Court held that, as a matter of law, Petitioners' affirmative defenses of breach of warranty of seaworthiness and failure of consideration were without merit and were inapplicable to the instant litigation. It specifically held that the doctrine of seaworthiness is inappropriate as a defense to a non-maritime complaint for damages from a default in payments due under a land-based leasing agreement. On the question of damages the District Court held that under Florida law the lessor was entitled only to damages equivalent to the rents accrued and in default at the time of surrender or repossession of the leased equipment, plus interest, costs and attorneys' fees.

The Court specifically held that the damage clause upon which the lessor was relying was "contrary to the established law in Florida" and "totally antagonistic to the judicial concept of 'just compensation.'" The result was that the lessor was awarded damages equal to the sum of the lease payments in default from September 1, 1970 until February 11, 1971. A Summary Final Judgment was entered on December 20, 1971.

The lessor filed its notice of appeal on January 11, 1972 and the lessee cross-appealed on January 19, 1972.

On July 18, 1972, the Court of Appeals (for the Fifth Circuit) rendered its decision. It affirmed the lower court's holding on the question of the viability of Petitioners' Affirmative Defenses of breach of the warranty

of seaworthiness and failure of consideration. In reaching this conclusion the appellate court expressed its view that the lessor "was not a demise charterer but rather was a financing agent" and, further, that the lessor ". . . was not a boat owner offering to lease a vessel." The facts of this case establish beyond doubt that the lessor was in fact the owner of the vessel and that Petitioners leased the boat from the lessor.

On the question of damages, the Court of Appeals reversed the lower court's holding that the contractual damages formula was invalid and remanded the case for appropriate action. (One minor clause in the formula was held invalid as a penalty.) The appellate court based its holding on its interpretation of Florida case law. Specifically, it was of the view that the three remedies available under Florida law to lessors[3] when their lessees breach a lease agreement are intended to be the sole remedies when no other remedies are provided in the lease or when broader contractual lease remedies violate public policy. The Court concluded that the damages formula set out in Section 14 of the contract did not violate any announced public policy of the State of Florida or constitute a double remedy. Therefore, it held that the terms of Section 14 should be used to determine the damages in this case.

In their Petition for Rehearing these Petitioners contended, *inter alia*, that the Court of Appeals had failed to correctly apply controlling Florida case when it concluded that Section 14 was not violative of that State's public policy and when it held that the lessor was not being afforded a double remedy. The Petition was denied.

[3]See footnote 3 in the opinion of the court below, Appendix A, *infra*.

REASONS FOR GRANTING THE WRIT

The court below has decided important questions of local landlord-tenant law in a way which conflicts with applicable local decisions.

1. The holding of the court below that the lessor was entitled to continue in possession of the leased vessel and recover payment of all sums due under the lease contract for the unexpired term of approximately eight years is in direct conflict with the decisions of the Florida courts in *Geiger Mutual Agency, Inc. v. Wright*, 233 So.2d 444 (Fla. App. 4th 1970), *Monsalvatge & Co. of Miami, Inc. v. Ryder Leasing, Inc.*, 151 So.2d 453 (Fla. App. 3rd 1963), and *Cutler Gate Bldg. Corp v. United States Leasing Corp.*, 165 So.2d 207 (Fla. App. 3rd 1964). In these decisions the Florida courts aligned themselves with the majority of jurisdictions and held that when a lease provides for the acceleration of rental payments on a breach, the right to recover the full rental, which might exist by reason of such an acceleration provision, is lost upon re-entry by the lessor, or surrender by the lessee. The facts of *Geiger Mutual, supra*, are nearly identical to those of the instant suit. There the appellate court reversed a lower court, which had enforced a lease acceleration clause in favor of the lessor, and held that because the lessor had taken possession of the leased property by ejectment he was foreclosed from obtaining a judgment for the rent for the balance of the term which had accrued after the ejectment but become payable immediately under an acceleration clause. Otherwise, the Court said there would be a "double remedy". It is apparent from the opinion that the Florida appellate court was of the view that the three remedies available to a lessor under Florida law are the

sole remedies even if there is a contractual acceleration clause involved; the Court of Appeals in the instant case adopted the opposite view, whereas the District Court adopted the same position as the *Geiger* appellate court—i.e., the lessor is entitled to recover the rental for the period between the default and the date the lessor retakes possession of the premises. In the instant case the lessor retook possession of the premises via the replevin judgment instead of through an action in ejectment.

Likewise, in *Cutler Gate Building Corp., supra*, the Florida appellate court reversed a lower court under facts which were very similar to *Geiger* and reiterated its adherance to the rule that a lessor, if he desires to hold a lessee to the terms of a lease, must do so in recognition of the tenancy and not in derogation thereof.

The court below failed to cite a single Florida case to support its view that the three remedies afforded to lessors under Florida law are not the sole remedies for lease breaches but operate only where the lease, for some reason or other, fails to provide a remedy.

2. The decision of the court below completely ignored the fundamental rule of Florida law that where actual damages resulting from a breach are susceptible of ascertainment by some known rule or pecuniary standard and the stipulated sum is disproportionate thereto, it will be regarded as a penalty. *Pembroke v. Caudill*, 160 Fla. 948, 37 So.2d 538, 6 A.L.R.2d 1395. The Florida Supreme Court has stated that the principal consideration in this area is whether the sum named is just compensation for the damage resulting from the breach. *Stenor, Inc. v. Lester*, 58 So.2d 673 (Fla. 1952). By ignoring this principle of

Florida law the decision sought to be reviewed reaches a result which contrary to the holdings and general thrust of Florida Courts—which is to seek a fair and just compensation under the facts. Actual damages are capable of proof in the case *sub judice*. However, under the decision of the Court of Appeals the lessor is entitled to recover the following as damages where a nine-year lease has been terminated during its first year:

a) A $215,000.00 boat for a purchase price of $100,000.00 (at a "public" sale of which Petitioners did not have notice);

b) A $212,000.00 damages payment from the lessee;

c) Rental income from the boat during the unexpired term of the Petitioners' lease—approximately $281,000.00 (eight-ninths of the lease contract price).

Admittedly, these are gross figures. Nevertheless, they graphically illustrate the monumental order of the windfall with which the lessor has suddenly been presented. Under the decision below the lessor, then, can potentially enjoy a recovery in excess of $600,000.00 on a contract providing for rental payments of $351,558.15.

Such a result is contrary to the principles of just compensation and actual damages which are the hallmark of Florida law.

3. The holding below involves a direct conflict with the decision of the Florida Supreme Court in *Greenblatt*

v. McCall & Co., 64 So. 748 (Fla. 1914) and is in conflict with the principles stated therein and adhered to in other cases such as *Stenor, Inc. v. Lester*, 58 So.2d 673 (Fla. 1952). In *Greenblatt, supra*, it was held that a contractual clause providing for liquidated damages in a "fixed amount of two-thirds of the agreed charge for all goods the contract provided to be delivered during the remaining term of the contract" [thus, the amount would vary as the term of the contract progressed] upon the failure of the purchaser to perform "*any of the terms or conditions*" [emphasis added] of the contract was a penalty because the clause attempts to secure performance of contractual covenants of varying importance and value. Rather than providing for damages in the amount of two-thirds of the agreed charge, in the instant case Section 14 provides for recovery of the full amount of the agreed charge. The damages formula in Section 14 explicitly applies to various specified acts of the lessee including the failure of the lessee "*to perform any other provisions hereof*" [emphasis added] within ten days of a written demand. Therefore, the holding below conflicts with the *Greenblatt* holding.

4. The decision below reaches a result which is contrary to the principle of Florida law, stated by the Florida Supreme Court, that *in doubtful cases* the courts are to construe contractual provisions for the payment of an arbitrary sum on breach of the contract as a provision for a penalty, not for liquidated damages. *Hyman v. Cohen*, 73 So.2d 393 (Fla. 1954). Considering the size of the lessor's recovery for a breach of a contract which was less than a year old, it is submitted that this presents, at the very least, a doubtful case which should be resolved against the lessor under the foregoing principle.

5. The decision of the Court below should be reviewed because it erroneously interprets the controlling Florida case law, and reaches a result which is contrary to the result which would be obtained in Florida courts, and is contrary to the District Court's interpretation of Florida law so as to depart from the rules established by this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188 (1938) and *Bernhardt v. Polygraphic Company of America, Inc.*, 350 U.S. 198, 100 L.Ed. 199 (1956).

6. The decision of the Court below is erroneous because it is contrary to the clear trend of Florida law, as reflected in the cases cited earlier and reaches a result which is untenable in light of these cases. The Florida courts have sought to instill a sense of reasonableness in the landlord-tenant, lessor-lessee relationship so as to protect both parties and insure that neither party is treated unjustly or unreasonably in the courts. To this end they have sought to ensure that lessees damaged by actions of lessors, or vice-versa, will be protected insofar as they may recover damages which are reasonable under standards of fairness and justice. But simultaneously these standards of fairness and justice have operated as limits on the parties so that, while they may recover, their recovery will not work an injustice on the other side. The decision below departs from this trend in Florida Courts.

The decision of the Court of Appeals involves important questions of local and non-local law.

1. The decision makes rather substantial changes in the landlord-tenant law of the State of Florida and such other states as adhere to the same general rules Florida applies in the area of remedies available to lessors. It

must be remembered that we are dealing in the general area of landlord-tenant law despite the fact that the immediate case involves the lease of personal property. Many of the Florida cases argued at all levels of the instant action have been landlord-tenant cases. Consequently, the ramifications of any decision extends beyond the four corners of such leases and well into the arena of landlord-tenant law, where battles are currently being waged on many fronts to afford tenants greater powers in their relations with the landlords. The decision of the Court below gives landlords the power to make substantial additions to or changes in the arsenal of remedies which are already available to them and which have been carefully developed over the years in an effort to provide protection for the lessor while preventing injustice to the lessee. Notwithstanding the statement of the Court below to the effect that Section 14 does not violate any announced public policy of Florida law, Petitioners submit that the statement of Florida law (the three remedies) contained in footnote three of that Court's opinion establishes the parameters of Florida policy beyond which the Court has improperly gone.

2. As suggested by the Court below, the questions presented by this case are of great and recurring significance because of the prevalence and increase in commercial lease transactions. The lower court felt this fact mitigated in favor of enforcing the specific terms of the contract before it. Petitioners disagree with that view. These lease contracts quite frequently involve interstate parties and, consequently, the frequency of litigation in the Federal Courts over the terms and conditions of the contracts, particularly damages clauses, will likely increase and recur with some regularity in the future. Therefore, this case

presents issues of far-reaching significance and an opportunity for this Court to resolve some of the more substantial problems likely to be raised by such litigation.

These are, for the most part, contracts of adhesion, so it becomes important to establish parameters beyond which the courts will not permit the lessor to go in his effort to make each lease absolutely air-tight in his favor.

The serious questions of public policy involved here and the effect of the decision below, if unreversed, on landlord-tenant law make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Thomas B. DeWolf of

Helliwell, Melrose & DeWolf
Attorneys for Petitioners
600 Brickell Avenue
Miami, Florida

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, to Feibelman, Friedman, Hyman & Britton, Attorneys for Respondent, First National Bank Building, Miami, Florida 33131, this 6th day of October, 1972.

/s/ Thomas B. DeWolf

Attorney

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1383
Summary Calendar*

CHANDLER LEASING DIVISION,
PEPSICO SERVICE INDUSTRIES LEASING
CORPORATION,
Plaintiff-Appellant-Cross Appellee,

versus

FLORIDA-VANDERBILT DEVELOPMENT
CORPORATION, formerly known as FLORIDA REALTY
CO., and HAROLD J. BAKER, individually,
Defendants-Appellees-Cross-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(July 18, 1972)

Before BELL, DYER and CLARK,
Circuit Judges.

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*Rule 18, 5th Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of N. Y.*, 431 F.2d 409, Part I (5th Cir. 1970).

CLARK, Circuit Judge: This appeal by plaintiff, Chandler Leasing Division of Pepsico Service Industries Leasing Corporation (Chandler), and cross-appeal by defendant, Florida-Vanderbilt Development Corporation (Florida-Vanderbilt), involves the validity of the defense of breach of warranty of seaworthiness and the proper measure of damages for an admitted breach of a written lease agreement covering a 55 foot yacht. The facts are not in dispute, but the admiralty and Florida legal conclusions to be derived therefrom are contested.

On January 23, 1970, Chandler leased to Florida-Vanderbilt a 1970 Chris Craft Cruiser for a nine-year term. On September 1, Florida-Vanderbilt ceased remitting payments and on October 30 wrote to Chandler terminating the lease because of acute electrolysis problems. Pursuant to a judgment of replevin issued by a Florida state court, Chandler repossessed the vessel on February 11, 1971, proceeded to hold a public sale of the vessel (which is not attacked procedurally) and purchased the vessel at that sale for 100,000 dollars.

Chandler filed this suit seeking a recovery of damages in accordance with the provisions of the lease contract which essentially consisted of the discounted value of all future rent payments less the purchase price of 100,000 dollars. Florida-Vanderbilt defended by claiming a breach of the warranty of seaworthiness. The district court refused to recognize the seaworthiness defense but entered summary judgment which limited Chandler's recovery to the accrued rental in default as of February 11.

Florida-Vanderbilt cross-appeals from the district court's disallowance of its affirmative defense that Chan-

dler breached its warranty of seaworthiness. Florida-Vanderbilt argues that a warranty of seaworthiness attached to the lease agreement despite the existence of a general, but universal, disclaimer clause.[1] It contends that the disclaimer in order to be efficacious against a warranty of seaworthiness, must specifically state that the warranty is abjured. The facts in the case at bar make this defense wholly inapplicable. Chandler was not a boat owner offering to lease a vessel. The lease makes it transparently clear that Florida-Vanderbilt chose the exact yacht and equipment it wanted and even selected the boat company from which it wanted the yacht to be acquired. The very first term of the lease provided:

> "EQUIPMENT; ACCEPTANCE. Lessee hereby leases from lessor, and lessor leaves to lessee, the personal property described above and in any schedule made a part hereof by the parties hereto (herein called 'equipment'). Lessee has chosen and requested equipment of the type and quantity specified herein and has selected the supplier named above. Lessor agrees to order such equip-

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[1] "3: WARRANTY. Lessor, without assuming responsibility for compliance by supplier, will request the supplier to authorize lessee to enforce in lessee's own name all warranties, agreements, or representations, if any, which may be made by the supplier to lessee (or lessor). LESSOR ITSELF MAKES NO EXPRESSED OR IMPLIED WARRANTIES OR REPRESENTATIONS AS TO ANY MATTER WHATSOEVER, INCLUDING, WITHOUT LIMITATIONS, THE CONDITIONS OF EQUIPMENT, ITS MERCHANTABILITY OR ITS FITNESS FOR ANY PARTICULAR PURPOSE. In no event shall any defect in or unfitness of the equipment relieve lessee of the obligation hereunder, once the item has been accepted, or presumed accepted under Paragraph 1 hereof, by lessee."

ment from said supplier, but shall not be liable in any event for specific performance of this lease or for damages of any type, if, with or without excuse, the supplier delays or fails to fill the order or delivery of the equipment is otherwise delayed or not made. Any delay in such delivery shall not affect the validity of this lease. Lessee shall accept such equipment if delivered in good repair, and hereby authorizes lessor to insert herein the serial number of each item of equipment so delivered. Unless lessee gives lessor written notice of each defect or other proper objection to any item of equipment within five (5) business days after receipt thereof, it shall be conclusively presumed, as between lessee and lessor, that the item was delivered in good repair and that lessee accepts it as an item of equipment described herein."

No principle of the maritime doctrine of warranty of seaworthiness, which applies to demise charters and related vessel leases, proscribes Chandler from contracting with Florida-Vanderbilt that a part of the consideration for the lease of a vessel Florida-Vanderbilt selected and caused Chandler to purchase should include a waiver of any warranty from Chandler. In substance, Chandler was not a demise charterer but rather was a financing agent. Under the facts here, the general disclaimer clause effectively remitted any claim arising from the leased vessel's physical condition to such claim as could be exerted against the manufacturer's warranties. The district court correctly struck the affirmative defense of breach of warranty of seaworthiness.

Florida-Vanderbilt attempts to also cast its defense in a failure of consideration mold. We similarly reject this attempt to reach the same result via a substitute route. The leased vessel it picked out was accepted and used, and rentals were remitted for many months. The obligations of the lease were fully assumed and cannot be negated in derogation of the document's plain terms.

Chandler argues that according to Subsection (A) of Section 14 of the lease agreement[2] it is entitled to: (i) 15%

[2]14. DEFAULT. If lessee, fails to pay any rent or other amount herein provided within ten (10) days after the same is due and payable. . . . lessor at its option may from time to time sue, at law or in equity, to enforce performance of this lease or to recover damages for breach thereof, or, may by notice in writing to the lessee terminate this lease as to any or all items of equipment; . . . . In the event of such notice of termination from the lessor, this lease shall terminate in accordance therewith as to the equipment specified ("terminated equipment") but the lessee shall nevertheless remain liable for all rents therefore and additional sums thereon accrued and unpaid at the time of termination and additionally shall be liable to lessor as hereinafter provided. In such event lessee shall remain liable for the return of the terminated equipment to lessor, as provided in paragraph 7 hereof, but lessor may take possession of any or all of said equipment, wherever it may be located without demand or notice, without any court order of process of law, and without incurring any liability to lessee for any damages occasioned by such taking of possession. Lessor shall make such efforts as are reasonable in the circumstances, at its option either to sell any or all of the terminated equipment at public or private cash or credit sale, or to re-let the same. In the event of such termination, lessee shall also be liable to lessor for a further sum, computed . . .: (A) As to any terminated equipment sold by lessor before the expiration of the initial term, the sum of (1) an amount equal to fifteen per cent of the actual cost to the lessor of such equipment, plus (2) the "balance of rent", being the unpaid balance (if any) of the total rent reserved herein attributable to such equipment for the portion of the initial term unexpired at the time of such termination ("unexpired term"), less (3) the net proceeds of such sale. . . . Since pursuant to the foregoing lessor may receive payment of such balance of rent at a time or times earlier or later than the same would have fallen due in the absence of termination, such balance of rent is to be adjusted by subtracting discount therefrom or adding interest thereto accordingly, at the rate of 6% per annum, and for the purposes of computing such

of the actual cost of the vessel, + (ii) the balance of the rent for the unexpired term of the lease from the date of termination minus the 100,000 dollars received from the sale, both adjusted by the required discounts or added interest, + (iii) expenses and attorneys' fees. Florida-Vanderbilt relies upon Cutler Gate Building Corp. v. United States Leasing Corp., 165 So.2d 207 (Fla.Dist.Ct. of Appeal, 3d Dist. 1964); Monsalvatge & Co. v. Ryder Leasing, Inc., 151 So.2d 453 (Fla.Dist.Ct. of Appeal, 3d Dist. 1963) to uphold the district court's judgment that such recovery would be inequitable and unjust.

Except for one particular—the requirement of an arbitrary payment of 15% of actual cost—the provisions of the present lease are distinguishable from Cutler Gate and Monsalvatge. The contractual clauses involved in both of those cases provided for damage in the amount of the unaccrued rents for the remainder of the lease term and in addition, the lessor was allowed the use and benefit of the leased property. The Florida courts held that it would be unjust and inequitable to allow the lessor this much compensation because in effect the lessor was afforded a double remedy. See also Geiger Mutual Agency, Inc. v.

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adjustments, the aforesaid proceeds of sale or re-letting and any sums received from lessee in respect of said termination and of all costs and expenses incurred by lessor hereinbelow mentioned, and thereafter, to the payment of the balance of rent. In addition to the foregoing, lessor may recover from lessee all costs and expenses, including without limitation, reasonable attorneys' fees and fees of collection agencies, incurred by lessor in exercising any of the rights or remedies, such costs and expenses to include, without limitation, in case of termination any and all incurred in taking or receiving possession, removal, storing, selling or re-letting the terminated equipment in reconditioning the same for selling or re-letting, and in repairing and restoring the same to the conditions stated in paragraph 7 hereof"

Wright, 233 So.2d 444 Fla.Dist.Ct. of Appeal, 4th Dist. 1970). Instead, the recovery was limited to the rentals in default at the time of the termination of the lease.

These cases cannot be interpreted to lay down the per se rule that irrespective of whatever contractual damage provision the parties may have agreed upon, only rentals in default could be recovered. Such a rule would not only conflict with the right of contracting parties to obligate themselves as they wish, but it would also be inconsonant with sound reason. Under so absolute a rule, lessees could breach lease agreements with impunity knowing that they would be liable only for the pyaments in default, and lessors on the other hand would never know when the property would be returned and in what condition. Such intolerable conditions would so seriously impair the commercial viability and efficacy of lease transactions that they would forestall or inhibit the negotiation of commercially valuable lease agreements.

However, the absolute requirement of Section 14 that a defaulting lessee pay 15% of the actual cost of the equipment leased can, in the context of the other damage covenants, only amount to an unenforceable attempt to contract for a penalty in excess of actual damages. It is not a liquidated damage clause. The damages were certainly capable of accurate estimation, if by no other means, then by the contractual process of selling the property let, applying sale proceeds to reduce the anticipated rental income and providing for the reimbursement of all retaking and selling expense. The percentage remained inflexible throughout the years of the lease and in no part served as a reasonable forecast of just compensation, which is the hallmark for legal damages under Florida

law. Pembrooke v. Caudill, 160 Fla. 948, 37 So.2d 538, 6 ALR2d 1395 (1948); Hungerford Const. Co. v. Florida Citrus Exposition, 410 F.2d 1229, cert. denied 396 U.S. 928 (1969); 1 Restatement of Contracts §339(1) (1932). For example, consider how unconscionable such a flat exaction would be in the latter months of the lease.

Florida follows the universal rule that parties sui juris may negotiate any contract not violative of law or public policy. See e.g., International Ass'n of Machinists v. State ex. rel. Watson, 15 So.2d 485 (Fla. en banc 1943); Troup v. Mayer, 116 So.2d 467 (Fla.Dist.Ct. of Appeal, 3d Dist. 1959); 17 C.J.S. Contracts §1(2) (1963). Except for the flat 15% of cost proviso, the present contractual method of damage calculation is not violative of any law or public policy. It does not provide for a double recovery as did the contracts in Cutler Gate and Monsalvatge. With the 15% penalty deleted, it is a reasonable damage provision that competent contracting parties were completely free to negotiate about and accept or reject.

We recognize that under the Florida case law there are three remedies available to lessors when their lessees breach a lease agreement.[3] However, these remedies are

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[3]The three remedies are:

"(a) he may treat the lease as terminated and resume possession of the premises, thereafter using the same exclusively as his own for his own purposes; or

"(b) he may retake possession of the premises for the account of the tenant, holding the tenant in general damages for the difference between the rentals stipulated to be paid and what, in good faith, the landlord is able to recover from a reletting; or

"(c) he may stand by and do nothing, and sue the lessee as each installment of rent matures, or for the whole when it

not established as the sole remedies which may be provided for lease breaches, but are intended to supply remedies when none are provided in the lease or when broader contractual lease remedies violate public policy. Since we conclude that without the 15% penalty Section 14 neither provides the lessor with a double remedy nor violates any announced public policy of the State of Florida, it is controlling on the question of damages. Therefore the district court erred in refusing to apply the remedy of that subsection to the breach admitted here.

Under Section 14 the termination date is crucial to the computation of damages. We construe that date to be February 11, 1971, the date the lessor first took an affirmative act indicating its choice of remedies under the provisions of the contract.

In view of our disposition of this case, we pretermit discussion on Florida-Vanderbilt's final point. The cause is remanded to the district court for a calculation of damages due Chandler under Section 14.

AFFIRMED in part, REVERSED in part, and REMANDED with directions.

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becomes due." 4 Adkins, Florida Real Estate Law and Procedure §106.04 at p. 1970 (1960). See also Kanter v. Safran, Fla. 1953, 68 So.2d 553, 557-558; Diehl v. Gibbs, Fla.App. 1965, 173 So.2d 719, 720.

Jimmy Hall's Morningside Inc. v. Blackburn & Peter Enterprises, Inc., 235 So.2d 344 (Fla.Dist.Ct. of Appeal, 2d Dist. 1970). See also Hyman v. Cohen, 73 So.2d 393 (Fla. en banc 1954).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

NO. 71-831-Civ-EC

CHANDLER LEASING DIVISION, PEPSICO SERVICE INDUSTRIES LEASING CORPORATION, a Delaware corporation,

Plaintiff,

vs.

FLORIDA-VANDERBILT DEVELOPMENT CORPORATION, an Ohio corporation, formerly known as FLORIDA REALTY CO., and HAROLD J. BAKER, individually,

Defendants.

[Filed Dec. 21, 1971]

SUMMARY FINAL JUDGMENT

THIS CAUSE came on to be heard upon the plaintiff's Motion for Summary Judgment, and this Court, on the 17th day of November, 1971, having entered its Order thereon and having determined that there is no genuine issue as to any material fact and that the plaintiff is entitled to a Summary Judgment as a matter of law, it is thereupon

ORDERED and ADJUDGED that plaintiff's Motion for Summary Judgment be and the same is hereby granted, and that the plaintiff, CHANDLER LEASING DIVISION, PEPSICO SERVICE INDUSTRIES LEASING CORPORATION, a Delaware corporation, do have and recover of and from the defendants, FLORIDA-VANDERBILT DEVELOPMENT CORPORATION, an Ohio corporation, formerly known as FLORIDA REALTY CO., and HAROLD J. BAKER, individually, the sum of $23,270.05 principal, together with interest at the rate of six per cent (6%) per annum from February 11, 1971 in the sum of $1,097.64, making a total of $24,367.69, a reasonable attorneys' fee in the sum of $3000.00, and costs to be hereinafter taxed, for all of which let execution issue.

ENTERED at Miami, Florida, this 20th day of November, 1971.

Emett C. Choate

U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

NO. 71-831-Civ-EC

CHANDLER LEASING DIVISION, PEPSICO SERVICE INDUSTRIES LEASING CORPORATION, a Delaware corporation,

Plaintiff,

vs.

FLORIDA-VANDERBILT DEVELOPMENT CORPORATION, an Ohio corporation, formerly known as FLORIDA REALTY CO., and HAROLD J. BAKER, individually,

Defendants.

[Filed Jan. 3, 1972]

ORDER AMENDING JUDGMENT

THIS CAUSE came on before the Court sua sponte, and it appearing to the Court that the Summary Final Judgment entered herein is dated the 20th day of November, 1971 when in truth and in fact said Summary Final Judgment should be dated the 20th day of December, 1971, it is thereupon

ORDERED and ADJUDGED that said Summary Final Judgment be and the same is hereby amended to the extent that it is dated the 20th day of December, 1971, all other terms and conditions of said Judgment to remain in full force and effect.

ENTERED at Miami, Florida, this 3rd day of January, 1972.

/s/ Emett C. Choate

SENIOR U.S. DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 71-831-Civ-TC

CHANDLER LEASING DIVISION, PEPSICO SERVICE INDUSTRIES LEASING CORPORATION,
Plaintiff,

v.

FLORIDA-VANDERBILT DEVELOPMENT CORPORATION, etc., and HAROLD J. BAKER,
Defendants.

[Filed Nov. 17, 1971]

ORDER

This cause came before the court upon the motion of the plaintiff, Chandler Leasing Division, Pepsico Service Industries Leasing Corporation, for summary judgment as to both liability and damages. Upon consideration of the pleadings and memoranda of law, the court finds that defendants' affirmative defenses of breach of warranty of seaworthiness and failure of consideration are without merit and inapplicable to the instant litigation. On Sep-

tember 3, 1971, the court ordered that the defendants' affirmative defense of breach of warranty of fitness for a particular purpose be stricken from the second amended answer since paragraph 3 of the lease agreement constituted a valid disclaimer of all warranties under Florida Statutes § 672.2-316. Defendants' response to plaintiff's motion for summary judgment attempts unsuccessfully to circumvent the warranty disclaimer by raising the affirmative defense of breach of warranty of seaworthiness, allegedly separate and distinct from the warranty of fitness for a particular purpose. The court is unable to find and the defendants have yet to present any authority for the use of the doctrine of seaworthiness in the context of this suit. The maritime doctrine of seaworthiness is a theory of liability without fault whereby a shipowner is held strictly responsible for personal injury or property damage resulting from his vessel being in an unseaworthy condition, and such doctrine is inappropriate as a defense to a non-maritime complaint for damages arising from the default in the payments due under a land-based leasing agreement. The defendants' companion affirmative defense of failure of consideration also does not hold water. The defendant did receive what it bargained for—the designated 55-foot Chris Craft vessel, not warranted to be fit for a particular purpose. The transaction was at arm's length.

According to *Cutler Gate Building Corp. v. United States Leasing Corp.*, Fla. 3 Dist. 1964, 165 So.2d 207, and *Monsalvatge & Co. of Miami, Inc., v. Ryder Leasing, Inc.*, Fla. 3 Dist. 1963, 151 So.2d 453, the plaintiff is entitled to damages for defendant's default equivalent to the rents accrued and in default at the time of surrender or repossession of the leased equipment, together with in-

terest, costs, and attorney's fees. Section (A) of paragraph 14 of the lease would render the defendant-lessee liable for rental payments for the full term of the lease (less the resale price), even though the lessor repossessed the vessel prior to the expiration of the lease, and, in addition, the lessee would be obligated to pay a penalty totalling 15% of the actual cost to the lessor of the leased equipment. Such a stipulated damage provision is contrary to the established law in Florida, as expressed above, and totally antagonistic to the judicial concept of "just compensation." Consequently, the plaintiff may recover damages from the defendants equalling the lease payments in default from September 1, 1970, until February 11, 1971, plus interest, costs, and reasonable attorney's fees. It is, accordingly,

ORDERED and ADJUDGED that the plaintiff's motion for summary judgment is granted, and plaintiff shall submit to the court for entry, with copy to opposing counsel, a proposed final judgment within five days of the entry of this order. Defendants shall then have three days to respond to plaintiff's proposed judgment.

DONE and ORDERED at Miami, Florida, this 17th day of November, 1971.

TED CABOT

UNITED STATES DISTRICT JUDGE

Copies to counsel.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1383
Summary Calendar*

CHANDLER LEASING DIVISION,
PEPSICO SERVICE INDUSTRIES LEASING
CORPORATION,
Plaintiff-Appellant-Cross Appellee,

vs.

FLORIDA-VANDERBILT DEVELOPMENT CORPORATION, formerly known as FLORIDA REALTY CO., and
HAROLD J. BAKER, individually,
Defendants-Appellees-Cross-Appellants.

Appeals from the United States District Court for the
Southern District of Florida

[Filed Aug. 22, 1972]
(August 22, 1972)

ON PETITION FOR REHEARING

Before BELL, DYER and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.